Heidelberg Univ., Illinois Coll., Iowa Wesleyan Coll., Kenyon Coll., Leland Stanford Jr., Univ., Univ. of Lille, Univ. of Maine, Univ. of Maryland, Massachusetts Institute of Technology, Michigan Agricultural Coll., Univ. of Minnesota, Mount Allison Univ., Muhlenberg Coll., New Hampshire State Coll., Univ. of New Mexico, Notre Dame Univ., Occidental Coll., Pennsylvania State Coll., Reed Coll., Ripon Coll., St. Louis Univ., Univ. of South Carolina, Syracuse Univ., Transylvania Coll., Trinity Coll. (N. C.), Tufts Coll., United States Naval Academy, Valparaiso Univ., Washington Coll. (Md.), West Virginia Univ., West Virginia Wesleyan Coll., Whitman Coll., Wittenberg Coll., Wofford Coll., Univ. of Wyoming, 1.

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IMMUNITY OF STATE EXECUTIVE FROM ARREST. — On July 20, 1921, the grand jury of Sangamon County, Illinois, returned an indictment against Len Small, governor of the state, charging him with embezzlement of public funds during a previous term as State Treasurer. Counsel for Governor Small, appearing as *amici curiae*, urged that the governor was immune from arrest during his term of office and sought to have the clerk of the court restrained from issuing a *capias*. The court decided that there was no such immunity, and ordered the clerk to issue process and the sheriff to make the arrest, unless the governor voluntarily submitted to the jurisdiction of the court.[1]

The question of whether the chief executive of a state may be arrested on a criminal charge during his term of office has never been directly decided.[2] Nor is any express provision as to the question to be found in the constitution or statutes of Illinois. Certain officers are specifically exempted from arrest under certain circumstances,[3] but there is no such provision regarding the governor. He is made liable to impeachment,[4] but this does not exclude the possibility of criminal prosecution.[5]

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[1] People *v.* Small, Ill. Circ. Ct., 7th Jud. Circ. (E. S. Smith, J.), decided July 27, 1921. The opinion may be found in the CHICAGO TRIBUNE for July 28, 1921. The governor refused to submit voluntarily to the jurisdiction of the court, and was arrested. He was released on bond, and the case is now awaiting trial, after a change of venue to Lake County.

[2] There are *dicta* taking the view of the principal case. See Attorney-General *ex rel.* Bashford *v.* Barstow, 4 Wis. 567, 762 (1856); United States *v.* Kirby, 7 Wall. (U. S.) 482, 486 (1869); Martin *v.* Ingham, 38 Kan. 641, 17 Pac. 162 (1888). But intimations to the contrary may be found. See Latture *v.* Frazier, 114 Tenn. 516, 86 S. W. 319 (1905); State *v.* Holden, 64 N. C. 829 (1870).

[3] Members of the legislature during sessions. See ILL. CONST., Art. IV, § 14. Electors while at the polls. *Ibid.*, Art. VII, § 4. Members of the militia while attending musters. *Ibid.*, Art. XIII, § 4. Judges and attorneys while attending court. See 1913 HURD'S REV. STATS. 107, § 9. In none of these cases does the immunity extend to cases of felony or breach of the peace. This in itself disposes of the argument that in the principal case the governor should be considered a member of the legislature, on account of his veto power, and hence exempt.

[4] See ILL. CONST., Art. V, § 15.

[5] *Ibid.*, Art. IV, § 24. "The party, [impeached] whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment and punishment according to law." In the Constitutional Convention an attempt was made to amend this section, so far as it applied to the governor, by adding the words "after the expiration of his term of office"; but this was debated and rejected. See 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1869–70, 792. This indicates that

The ordinary rule of the common law is that an official is not exempt from liability for his unlawful acts while in office,[6] even when he presumes to act as an official, but acts *ultra vires*.[7] The general policy is that "all men are equal before the law." *A fortiori*, election to a public office does not, in the ordinary case, carry with it immunity from prosecution for crime committed before such election. But there are certain exceptions to these general principles. Where the official is a personal sovereign, such as the King of England, or the personal representative of such a sovereign,[8] he is immune from all process, civil or criminal. It can hardly be contended that the governors of the several states come within this category. Another exception exists where the suit against the official is in substance a suit against the state,[9] which is clearly not the case here. Should there be a further exception in the case of the governor of a state *qua* governor?

One argument in support of the exemption is that the courts cannot enforce the arrest of the chief executive.[10] It is said that the ultimate sanction of the court's process is the military power of the state, which is under the control of the governor, and hence it will be vain for the court to attempt his arrest. But, as has been forcibly pointed out,[11] it must be presumed that the governor will obey the law, and will not call out the militia to prevent its enforcement. That he may act unlawfully is no reason why the court should refuse to enforce the law so far as it is able.[12]

It is also urged that the constitutional principle of the separation of

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the framers of the constitution did not intend that the governor should be exempt from arrest during his term of office. Nor can it be said that impeachment is a condition precedent to trial. If this were so, every subordinate official constitutionally liable to impeachment would be exempt from arrest until after impeachment; and where, as in the present case, the offense was one committed before election to office, trial would be impossible while the offender held office.

[6] Burton *v.* United States, 202 U. S. 344 (1906); Williamson *v.* United States, 207 U. S. 425 (1908). See 2 WILLOUGHBY, CONSTITUTIONAL LAW, 1062; DICEY, LAW OF THE CONSTITUTION, 7 ed., 185. See also United States *v.* Kirby, 7 Wall. (U. S.) 482, 486 (1868), and cases cited in note 7, *infra*.

[7] Osborn *v.* Bank of the United States, 9 Wheat. (U. S.) 738 (1824); Davis *v.* Gray, 16 Wall. (U. S.) 203 (1872); United States *v.* Lee, 106 U. S. 196 (1882). The English rule is the same. Fabrigas *v.* Mostyn, 1 Cowp. 161 (1775). This is in remarkable contrast to the *droit administratif* of the continental law. See DICEY, LAW OF THE CONSTITUTION, 7 ed., 324–401.

[8] Fabrigas *v.* Mostyn, *supra* (crown governor of a British colony).

[9] Hagood *v.* Southern, 117 U. S. 52 (1886).

[10] See Rice *v.* Draper, 207 Mass. 577, 93 N. E. 821 (1911); State *ex rel.* Robb *v.* Stone, 120 Mo. 438, 25 S. W. 376 (1894). These were cases of *mandamus*, but the court refused the writ because of inability to enforce obedience and not for constitutional reasons.

[11] See Ekern *v.* McGovern, 154 Wis. 157, 142 N. W. 595 (1913). See also Ballantine, "Is a Governor Privileged by his Office from Arrest and Prosecution for Crime?" 93 CENT. L. J. 111.

[12] A variant of this argument is one based on the pardoning power. It is said that although the governor is convicted, he will remain governor, and can pardon himself; and hence the court's action will be nugatory. Even if this were true, which may well be doubted, such a pardon would not completely wipe out the effects of the conviction. Under the constitution of the state, the misappropriation of public money, without more, makes the wrongdoer ineligible to public office. See ILL. CONST., Art. IV, § 4. The conviction would establish this, though there were a later pardon. See Williston, "Does a Pardon Blot Out the Offense?" 28 HARV. L. REV. 657.

powers [13] prevents the courts from in any way coercing or restraining the chief executive.[14] On this ground it is held by a majority of the states that the governor is not subject to *mandamus*, even as to acts purely ministerial,[15] and this is the settled rule in Illinois.[16] The rule as to injunction is generally said to be the same,[17] though it is significant that the Supreme Court of Illinois has considered on the merits two bills for an injunction against the governor.[18] But the refusal of the courts to control the chief executive's official acts by *mandamus* or injunction is not conclusive of the present case. There the court is controlling an official act; here it is enforcing the law against a person whose wrongful act has no connection with his official position. Moreover, though the arrest of the governor may indirectly interfere with his official acts,[19] the principle of the separation of powers is not thereby violated. The effect of that principle is to forbid any department of the government to exercise the power belonging to another, except within more or less elastic limits.[20] It is a rule of separation of function, not of special privileges and immunities. It may well be that when a court by *mandamus* or injunction controls the performance of an official act, it is exercising executive power, but this is certainly not the case when the executive is arrested, although his performance of his official duties may be hampered thereby. Nor is such indirect interference forbidden by a constitutional principle that no department of the government is to hamper any other in the performance of its duties. It is claimed by some that there is such a principle, which rests on the prac-

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[13] This principle is expressly embodied in the constitution of Illinois. See ILL. CONST., Art. III.

[14] This is the principal argument urged in a recent article dealing with the principal case. See Gillespie, "A Governor cannot be Lawfully Arrested or Put upon Trial while in Office," 93 CENT. L. J. 149. Mr. Gillespie was of counsel for Governor Small.

[15] See MERRILL, MANDAMUS, §§ 92–96. The prevailing view is that *mandamus* will not issue even where the act is purely ministerial. But a few courts allow it in such cases. McCauley *v.* Brooks, 16 Cal. 11 (1860); Cotten *v.* Ellis, 7 Jones L. (N. C.) 545 (1860).

[16] People *ex rel.* Billings *v.* Bissell, 19 Ill. 229 (1857); People *ex rel.* Harless *v.* Yates, 40 Ill. 126 (1863); People *ex rel.* Bruce *v.* Dunne, 258 Ill. 441, 101 N. E. 560 (1913).

[17] Mississippi *v.* Johnson, 4 Wall. (U. S.) 475 (1866); Frost *v.* Thomas, 26 Colo. 222, 56 Pac. 899 (1899). See 2 HIGH, INJUNCTIONS, § 1326.

[18] Hubbard *v.* Dunne, 276 Ill. 598, 115 N. E. 210 (1917); Mitchell *v.* Lowden, 288 Ill. 327, 123 N. E. 566 (1919). But these cases may perhaps be reconciled with the prevailing view on the ground that in them the governor did not object to the jurisdiction. It has been held in Illinois that if the governor submits to the jurisdiction, the court may direct a *mandamus* to him. People *ex rel.* Stickney *v.* Palmer, 64 Ill. 11 (1872). But if the court has no constitutional power to act, it would seem that the fact of the governor's failure to object to the jurisdiction should be immaterial. This is the view taken in most states. State *ex rel.* Robb *v.* Stone, *supra*; State *ex rel.* County Treasurer *v.* Dike, 20 Minn. 363 (1874).

[19] See Gillespie, *op. cit.*, 152 *et seq.*

[20] See 1 STORY, COMMENTARIES ON THE CONSTITUTION, 3 ed., § 525. See also Greenwood Cemetery Land Co. *v.* Routh, 17 Colo. 156, 163, 28 Pac. 1125, 1127 (1892). *Cf.* THE FEDERALIST, No. 42. The doctrine of the separation of powers does not prevent the courts from taking jurisdiction in *quo warranto* to determine who is *de jure* governor. Attorney-General *ex rel.* Bashford *v.* Barstow, *supra*; State *ex rel.* Thayer *v.* Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602 (1891). Here there is an interference with the *de facto* operation of a coördinate department of the state government, but no exercise of executive power.

tical necessities of government.[21] But it is very doubtful whether an exception to the common-law denial of official immunity can be supported on this basis.[22] How much less, then, can a constitutional exemption, fixing an immutable rule which even the legislature cannot alter, be implied, in the absence of any constitutional provision even remotely bearing on the point.[23]

The most forcible argument in favor of executive immunity is the practical one. It is said that public policy demands that the governor be free to devote all his time to his official duties, unhampered by liability to stand trial in the criminal courts.[24] It must be admitted that this difficulty is a serious one, and that it has apparently prevailed in some cases where it was sought to compel the governor to testify as a witness.[25] But the alleged testimonial immunity of the chief executive had been severely criticized,[26] and it may well be doubted whether it exists.[27] Even if it does, it is submitted that the public policy that crime shall be punished according to law is weightier than that which requires all competent witnesses to testify. Further, in the subpœna cases, there was no positive statute to be construed away.[28] In dealing with the practical argument, little is to be gained by imagining possible extreme cases. It is not enough to show that the governor might conceivably be kept so busy answering vexatious criminal charges that the state government would be virtually without a head; [29] nor to point out, on the other hand, that a governor immune from arrest might conceiv-

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[21] See W. T. Hughes, "Immunity for Governors," 54 CHICAGO LEG. NEWS, 51.

[22] See p. 188, *infra*.

[23] See Martin *v.* Ingham, 38 Kan. 641, 645, 17 Pac. 162, 165 (1888). "There is no express provision in the constitution, nor in any statute, exempting any member of the executive department, chief or otherwise, from being sued in any action . . . civil or criminal . . ., or from being liable to any process or writ properly issued by any court . . .; and if any one of such officers is exempt . . ., it must be because of some hidden or occult implications in the constitution or statutes, or from some inherent and insuperable barriers founded on the structure of the government itself. . . ." Ordinarily, constitutional limitations must be traceable to express provisions; here there are none, while the traditional common law as to official immunity is the other way. See COOLEY, CONSTITUTIONAL LIMITATIONS, 6 ed., 201. An express provision is especially needed when dealing with the executive department, since the constitution of Illinois is construed as a grant to the executive and judiciary, and a limitation on the legislature, so that any residuary powers are in the latter. Field *v.* People *ex rel.* McClernand, 3 Ill. 79 (1842).

[24] See Gillespie, *op. cit.*, 153. *Cf.* 10 JEFFERSON, WORKS, ed. by Ford, 403–405.

[25] See Thompson *v.* Railroad Co., 22 N. J. Eq. 111 (1871); Appeal of Hartranft, 85 Pa. St. 433 (1877). But see note 24, *infra*. See also 23 HARV. L. REV. 633.

[26] See 4 WIGMORE, EVIDENCE, 2 ed., § 2371.

[27] See United States *v.* Burr, Fed. Cas. 14,692d (1809); 23 HARV. L. REV. 633. The cases cited in favor of the supposed exemption are not square decisions. In Thompson *v.* Railroad Co., *supra*, the subpœna was issued, but the court in its discretion refused to commit the governor for contempt for failure to obey. In Appeal of Hartranft, *supra*, the case really turned on the privileged character of state secrets.

[28] See note 30, *infra*.

[29] That the disastrous consequences, which some supporters of gubernatorial immunities seem to fear, are not likely to follow is shown by experience in England. The prime minister and other cabinet members are, of course, liable to arrest and to civil process. See King *v.* Lords Commissioners of the Treasury, 5 N. & M. 589 (1835); Ellis *v.* Earl Grey, 6 Sim. 214 (1833). Yet we do not hear of the English government being hampered by continual vexatious criminal prosecutions against the prime minister.

ably commit crimes with impunity. If such situations arise, they will be met by extra-legal action. The real question is whether executive immunity from arrest is of sufficient practical necessity to require a departure from the traditional Anglo-American principle of equality before the law, and to justify reading an exception into criminal statutes in their terms absolute.[30] To give an elected governor the personal immunity of an hereditary king is so contrary to the spirit of American institutions that a greater practical necessity than exists in this case should be required in order to reach that result.[31]

Judicial readiness to resist the executive prerogative when carried beyond its legal limits has been one of the glories of the common-law tradition. Bacon to the contrary notwithstanding, the judges have not been "lions under the throne." The action of the Illinois court in this case, in the face of a threat by the governor to call out the militia to resist arrest, is reminiscent of Coke's sturdy resistance to James I in the famous *Case of the Prohibitions*.[32]

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EFFECT OF ABANDONMENT OF DOMICIL OF CHOICE. — It is to the interest of organized society that the civil status of everyone be governable by some one system of civilized jurisprudence. In order to effectuate this interest, the law has built up the concept of domicil,[1] which may be described,[2] roughly, as a person's "legal home."[3] Obviously, this includes two elements — one of fact, the other of law. Where one has established his "domestic hearth" is a question of fact. But, since domicil is the legal conception of and not necessarily the actual home of a person, rules of law and circumstances of fact may not, at times, coincide. Thus, though it is factually possible for one to have any number of homes or none at all, it is axiomatic in the common law that no person can at the same time have more than one domicil,[4] and that everyone must

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[30] The procedure following the return of an indictment is entirely regulated by statute. See 1913 HURD'S REV. STATS. 877, §§ 414–420. It is provided that the judge *shall* fix the amount of bail (§ 414), that the clerk of court *shall* issue process of *capias* (§ 415), and that the sheriff *shall* make the arrest (§ 417). None of these officials are given any discretion in the matter.

[31] It may be argued that no one could take the governor's place in case he is convicted. The constitution provides for the conduct of the government in case of death, conviction on impeachment, failure to qualify, resignation, absence from the state, or "other disability" of the governor. See ILL. CONST., Art. V, § 17. This would seem to cover arrest and imprisonment, which is certainly a "disability." It is hardly a case for the application of the maxim of *eiusdem generis*.

[32] 12 Co. 63 (1607).

[1] Both the term "domicil" and the legal idea which it represents were conceived in the Roman law. See 4 PHILLIMORE, INTERNATIONAL LAW, 3 ed., § 38. The common-law theory of domicil did not begin to take shape until the reign of Charles II. See 2 BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS, 1908 ed., 15. And see *In re* Capdevielle, 2 H. & C. 985, 1018 (1864).

[2] Eminent authorities have found difficulty in agreeing upon an exact definition of domicil. See DICEY, DOMICIL, Appendix, n. 1.

[3] See BEALE, SUMMARY, CONFLICT OF LAWS, § 28.

[4] Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170 (1840). There are no cases *contra*. There are, however, strong *dicta* asserting the possibility of double domicil. See *In re* Capdevielle, *supra*, at 1018. It has been suggested that a person may, at the